In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1678

VAN C. VOLLMER and THE INDIANA INVESTOR AND BUSINESS NEWS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on January 22, 1971.[1] A petition for rehearing was denied on March 29, 1971. The petition for a writ

[1] Petitioners were co-defendants in the trial of the petitioners in Nos. 1617, 1635, 1637 and 6964, this Term. See our consolidated brief in opposition in those cases and our brief in opposition in *Irving* v. *United States*, No. 1375, this Term. "App." references herein refer to the Appendix we will lodge with the Clerk in Nos. 1617, 1635, 1637 and 6964.

of certiorari was not filed until May 6, 1971, and is thus out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason for plenary review.

Petitioners were the editor and the corporate owner of a financial newspaper. They were convicted of one violation of subsection (a) and one violation of subsection (b) of Section 17 of the Securities Act of 1933 (15 U.S.C. 77q(a) and (b), set out at pp. 5-6 of the petition). Concurrent sentences of three years' imprisonment were imposed on petitioner Vollmer (App. 318-319). The corporate petitioner was fined a total of $10,000, $5,000 on each count (App. 319-320). The court of appeals affirmed (Pet. 1a-33a).

The relevant evidence is summarized in the opinion below (Pet. 16a-19a). In general it tended to show that Vollmer, as editor of Indiana Investor and Business News, knowingly published false or misleading reports and editorial comment concerning the stock of Air and Space Underwriters, Inc. (ASU).

The evidence supporting the conviction under subsection (a) showed that an investor, Mrs. Stech, read about ASU in the Indiana Investor and then obtained Vollmer's advice, after which she made a purchase. While the court below recognized that Vollmer had "made no identifiable affirmative misrepresentation" in his conversation with Mrs. Stech, it determined that the evidence tending to show that Vollmer had knowingly published misleading reports and comment was sufficient in the light of the circumstances to support the jury's conclusion that he was a willful "participant in the fraudulent course of conduct

which generated the sales to Mrs. Stech, and, indeed, others" (Pet. 17a-18a). There is no occasion to review that factual determination.

2. As to the count under subsection (b), the evidence showed that one Robert Chappell, after discussing with Vollmer a story about the acquisition by Chappell's company (Investment Corporation of America) of ASU, agreed to buy subscriptions of Indiana Investor for all stockholders of that company. While such subscriptions would normally cost $1,000 to $1,200, Chappell paid Vollmer $2,500 (Pet. 18a-19a). The newspaper published the story about the acquisition—which was in itself misleading—without disclosing that consideration had been received therefor as required by 15 U.S.C. 77q(b).

Petitioners argue that any limitation on their right to print information regarding the stocks was an abridgment of their First Amendment rights. Subsection (b), however, does not limit petitioners in their expression of opinion or statement of fact. It requires only that the publisher fully disclose any consideration received or to be received in return for the opinion given or purported facts stated as to a security. In the language of the House Report, quoted in the court of appeals opinion (Pet. 19a), Section 17(b) "is particularly designed to meet the evils of the 'tipster sheet' as well as articles in newspaper[s] or periodicals that purport to give an unbiased opinion but which opinions in reality are bought and paid for." As the court below pointed out, the investing public has a substantial interest in knowing whether an apparently objective statement

in the press concerning a security is motivated by promise of payment (Pet. 19a). There is no First Amendment right against full disclosure in such circumstances (cf. *Talley* v. *California*, 362 U.S. 60, 63). And certainly freedom of the press is not abridged when a newspaper owner is subject to criminal punishment for deliberately publishing false reports to aid the fraudulent sale of stock. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 150 (opinion of Mr. Justice Harlan).

3. The contention that the acquittal of Chappell in another trial required reversal of petitioners' convictions is without substance. The evidence indicated Vollmer's connection with ASU almost from the beginning of the fraudulent promotion of that company's stock and he was aware that the stories and comments published in Indiana Investor were false; Chappell and his company did not come into the picture until 1965.[2] There was thus ample reason to sever the case as to Chappell and not as to these petitioners. The fact that another jury acquitted Chappell does not undermine petitioners' conviction here. Cf. *Dunn* v. *United States*, 284 U.S. 390.

It is respectfully submtited that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

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[2] There was evidence at the trial that, after acquiring control of ASU, Chappell at a dinner for Securities Services stated that ASU had a number of problems. The story in the Indiana Investor did not disclose any of the adverse comments.

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